



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/780,273	02/09/2001	Barrie R. Froseth	5390USA	8033
30173 7590 01/28/2011 GENERAL MILLS, INC. P.O. BOX 1113 MINNEAPOLIS, MN 55440				
EXAMINER THAKUR, VIREN A				
ART UNIT		PAPER NUMBER		
1782				
MAIL DATE		DELIVERY MODE		
01/28/2011		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte BARRIE R. FROSETH, RAYMOND BOWERS, KATY P.
DICKSON, MIKE E. GEDDIS, MYER JOY, PAUL MULLER,
KIMBERLY A. NELSON, LISA R. SCHROEDER, SHERI M.
SCHELLHAASS, JEFFREY D. THORESEN SEVERTS, BERNHARD
VAN LINGERICH, DAVID E. WILLIAMS, and PHILIP K. ZIETLOW

Appeal 2009-010351
Application 09/780,273
Technology Center 1700

Before CHUNG K. PAK, JEFFREY T. SMITH , and
KAREN M. HASTINGS, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

This is an appeal under 35 U.S.C. § 134 from the non-final rejection of claims 128, 134, 135, 137-139, and 144-146.² We have jurisdiction under 35 U.S.C. § 6.

Appellants' claimed invention relates to a food product comprising popcorn, flavoring and a sweetener additive. Claims 128 and 138 are illustrative:

128. A customized food product comprising:

a food ingredient selected by a consumer, said food ingredient being popcorn;

a flavoring selected by the consumer;

an additive selected by the consumer, wherein the additive is sucralose; and

a microwave package, selected by the consumer, containing the food ingredient, the flavoring and the additive, wherein the food product requires further finishing by the consumer in order to pop the popcorn with microwaves and heat the sucralose in the package.

138. A method for preparing a food product comprising:

adding sucralose to unpopped popcorn;

packaging the popcorn and sucralose for distribution; and

²Although the action appealed from was a non-final rejection, we have jurisdiction pursuant to 35 U.S.C. §§ 6 and 134 since the claims have been twice presented and rejected. *See Ex parte Lemoine*, 46 USPQ2d 1420, 1423 (BPAI 1994).

requiring the food product to be further finished by a consumer wherein further finishing of the food product by the consumer involves microwave cooking the food product in the packaging in order to pop the popcorn while heating the sucralose.

The Examiner relied on the following references in rejecting the appealed subject matter:

Katz et al.	US 3,851,574	Dec. 3, 1974
Belleson et al.	US 4,751,090	Jun. 14, 1988
Bebiak et al.	US 6,358,546 B1	Mar. 19, 2002
Brown et al.	US 6,618,062 B1	Sept. 9, 2003
Daenkindt et al.	EP 0335852 A1	Oct. 4, 1989
Ezzat	GB 2 250 255 A	Mar. 6, 1992

International Food Information Council, *Everything You Need to Know About Sucralose* (May 1998).

Posting of K Horton to
<http://groups.google.com/group/misc.health.diabetes/topics?lnk=srg&hl=en>
(search “Artificial Sweetener You Can Bake With?”) (June 16, 1999).

Posting of Maguire to
<http://groups.google.com/group/alt.support.diet.low-carb/> (search “Make Your Own LC Gift Basket”) (Dec. 9, 1999).

Posting of Jamie to
<http://groups.google.com/group/alt.support.diet.low-carb/> (search “Can Sucralose be Carmelized?”) (Jan. 21, 2000).

Posting of Debbie Cusick to
<http://groups.google.com/group/alt.support.diet.low-carb/> (search “Can Sucralose be Carmelized?”) (Jan. 22, 2000).

Posting of Danieljsza to
<http://groups.google.com/group/misc.health.diabetes/topics?lnk=srg&hl=en>
(search “sugar alcohol” and “danieljsza”) (Jan. 19, 2001, 08:48:28 PST).

Appellants appeal the following rejections as set forth in the Examiner's Answer:³

A. Claims 128, 134 and 144 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combined teachings of Ezzat, Katz, Google Groups (12/8/1999), Daenkindt, Belleson, Google Groups (6/16/1999), Google Groups (1/21/2000), Google Groups (1/22/2000), Google Groups (1/19/2001), International Food Information Council (IFIC), Brown and Bebiak.

B. Claims 135, 137-139, 145 and 146 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combined teachings of Ezzat in view of Katz, Google Groups (12/8/1999), Daenkindt et al., Belleson et al., Google Groups (6/16/1999), Google Groups (1/21/2000), Google Groups (1/22/2000), Google Groups (1/19/2001), and International Food Information Council (IFIC).

OPINION⁴

Our review of the Examiner's obviousness analysis requires that the claims must first be correctly construed to define the scope and meaning of

³ According to the Examiner's Answer 2-3, claims 137 and 139 were inadvertently excluded from the Non Final office action dated April 14, 2008. Claims 137 and 139 have now been included in the rejection reproduced in paragraph "B" below.

⁴ Appellants have not presented separate arguments for all of the rejected claims. Rather, Appellants' arguments are principally directed to independent claim 128. Any claim not separately argued will stand or fall with independent claim 128. See 37 C.F.R. § 41.37(c)(1)(vii) (2010). Appellants' arguments directed to the second stated rejection will also be addressed to the extent that they differ from the arguments presented for the first stated rejection.

each contested limitation. *See Gechter v. Davidson*, 116 F.3d 1454, 1457 (Fed. Cir. 1997). During prosecution before the Examiner, the claim language should be given its broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account any definitions or enlightenment contained in the written description of Appellants' Specification. *See In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997). "[T]he specification 'is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term.'" *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005) (en banc).

Applying the preceding legal principles to the present case, we determine that the subject matter of claim 128 is directed to a food product comprising popcorn, a flavoring, and a sucralose additive. The claimed invention specifies that the food product is contained in a microwavable package.

We will treat the claim language "the food product requires further finishing by the consumer" as a property or characteristic of the food product composition. Thus, the Examiner can establish a prima facie case of unpatentability by identifying prior art reference(s) that describe or suggest a food product comprising popcorn, flavoring, and a sucralose additive in a microwavable package.

We determine the subject matter of claim 138 is directed to a method of preparing a food product comprising adding sucralose to unpopped popcorn and placing the mixture into a package. We will treat the claim language "for distribution; and requiring the food product to be further finished by a consumer" as an intended use for the product prepared by the

described method. Thus, the Examiner can establish a prima facie case of unpatentability by identifying prior art reference(s) that describe or suggest adding sucralose to unpopped popcorn and placing the mixture into a package.

The issue on appeal is: Did the Examiner err in determining that it would have been obvious to a person of ordinary skill in the art to form a food product composition that comprises popcorn, sucralose, and a flavoring additive, as required by independent claim 128 and a method for preparing such a food product as required by independent claim 138? We answer these questions in the negative.

We AFFIRM.

The Examiner correctly found that Ezzat discloses a microwavable package comprising a food product including unpopped popcorn kernels, a flavoring ingredient, and additives. (Ans. 5-6). Ezzat specifically discloses the microwavable package contains “corn kernels with the necessary spices depending on the variety of popcorn to be prepared. They may be salt, butter, sugar, etc.” (Ezzat, p. 2, ll. 5-7). The Examiner also correctly found that Katz discloses a microwavable package comprising a food product including unpopped popcorn kernels, a flavoring ingredient, and a mixture of sweeteners including carbohydrates. (Ans. 6; Katz, col. 3, ll. 23-25; col. 3, l. 66- col. 4, l. 9). Further, the Examiner correctly found that Belleson discloses a microwavable package comprising a food product including unpopped popcorn kernels, a flavoring ingredient, and a mixture of sweeteners including a variety of saccharides. (Ans. 6; Belleson, col. 2, ll. 2-17). The Examiner correctly found that Daenkindt was evidence that acesulfame K was a recognized high-intensity sweetener utilized in addition

to or in place of sugar (sucrose). The Examiner correctly found that Katz, Daenkindt, Belleson, Google Groups references, and IFIC disclose the use of alternative sweeteners in combination with one another. The Examiner concluded, based on the teachings of the cited references, that it would have been obvious to a person of ordinary skill in the art to utilize known alternative sweeteners (i.e., sucralose and acesulfame K) in the popcorn product of Ezzat. (Ans. 6-9).

Appellants' arguments in rebuttal to the stated rejections have been fully considered. However, the arguments are not persuasive for the reasons set forth by the Examiner in the Answer. (Ans. 10-22). We add the following for emphasis

We agree with the Examiner that a person of ordinary skill in the art would have had a reason, suggestion or motivation to select sucralose and/or acesulfame K as one of the sweetening agents, in lieu of or in addition to some sugar, in the popcorn product of Ezzat due to dietary concerns, with a reasonable expectation of successfully imparting a desired sweetening effect. Based on the collective teachings of the prior art references relied upon by the Examiner, a person of ordinary skill in the art would have recognized the appropriate utilization or employment of sucralose and/or acesulfame K in a popcorn product. On this record, Appellant's have not directed us to evidence that establishes sucralose was not previously known to be suitable for utilization in food products that required cooking. Consequently, based on the prior art cited by the Examiner, a person of ordinary skill in the art would have reasonably expected that utilizing sucralose in the popcorn product of Ezzat would have reduced the product's caloric content and provide a desired sweetening effect.

Appellants, Reply Brief 2, argue “[c]laim 128 is specifically directed to a consumer customized food product.” This argument is not persuasive because the prior art teaches or suggest a food product embraced by the claimed consumer customized food product invention. The subject matter of claim 128 is directed to a food product that comprises popcorn, a flavoring, and a sucralose additive. Appellants have not established how the method of selection (i.e., selected by the consumer) distinguishes the claimed food product from a prior art food product that comprises the same ingredients.

For the foregoing reasons the rejections of claims 128, 134, 135, 137-139, and 144-146 under 35 U.S.C. § 103(a) are affirmed.

ORDER

The rejections of claims 128, 134, 135, 137-139, and 144-146 under 35 U.S.C. § 103(a) are affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(v).

AFFIRMED

bar

GENERAL MILLS, INC.
P.O. BOX 1113
MINNEAPOLIS, MN 55440